

# AMAZON: EARTH'S MOST CUSTOMER-CENTRIC COMPANY?

by Adam J. Langino and Leslie M. Kroeger

“The most important single thing is to focus obsessively on the customer. Our goal is to be earth’s most customer-centric company.”—Jeff Bezos, CEO of Amazon.com, Inc.

On August 13, 2020 in *Bolger v. Amazon.com, LLC*<sup>1</sup>, California’s Fourth Appellate District held that Amazon.com, LLC can be held liable for a third-party sellers’ defective products. This article discusses that decision, its background, and its potential aftermath.

Amazon.com, LLC is a subsidiary of the parent company Amazon.com, Inc. Amazon.com, LLC is the entity that runs Amazon.com. Amazon.com LLC (hereinafter “Amazon”) is a Delaware company with its principal address in Seattle, Washington. In the U.S., approximately half of all online shopping dollars are spent on Amazon.com.

Amazon establishes the pricing for approximately 40 percent of products it selects, buys, and sells to customers online. Those products were not at issue on appeal.<sup>2</sup> The remaining 60 percent are products sold by third parties through Amazon’s website. These third-party sellers select their own products, source them from manufacturers or distributors, set the product’s price, and reach customers through Amazon.com.<sup>3</sup>

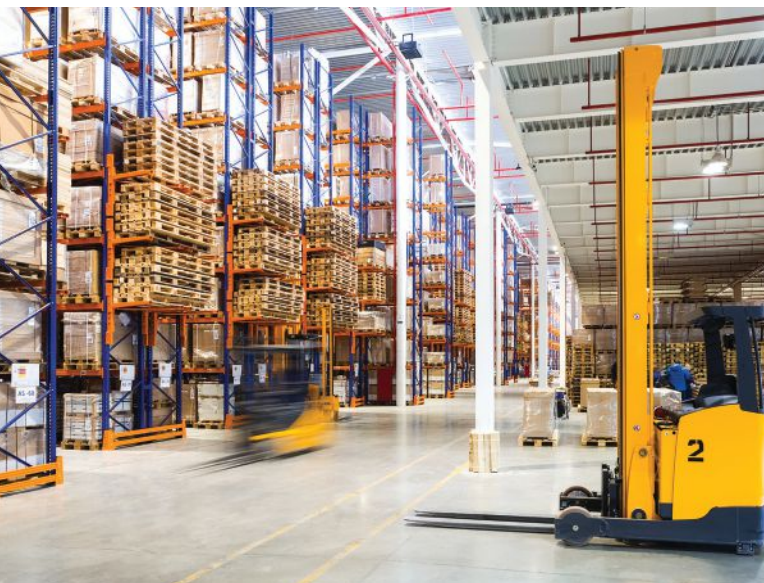
In 2017, the *Bolger* Plaintiff sued several companies, including Amazon.com LLC, and at least one California corporation, alleging that they were accountable for negligence, breach of warranty, and strict liability in selling a Hewlett Packard laptop computer that exploded in her lap causing severe burns to her body.<sup>4</sup> The Amazon listing for the battery identified the seller as “E-life,” a fictitious name used by Lenoge Technology (HK) Ltd. Lenoge was served but did not appear, so the trial court entered a default.<sup>5</sup>

In 2019, the trial court granted summary judgment for Amazon, which argued that the doctrine of strict products liability law did not apply to it because it did not distribute, manufacture, or sell the product in question.<sup>6</sup> It argued its website was an “online marketplace” and E-life (Lenoge) was the product seller, not Amazon.<sup>7</sup>

In 2020, California’s Fourth District Court of Appeal reversed the trial court’s judgment in favor of Amazon. It held that under the circumstances of *Bolger*’s transaction, Amazon may be strictly liable for the defective laptop that was sold by a third-party seller, *i.e.*, Lenoge. Amazon charged *Bolger* for the purchase, retrieved the laptop battery from its location in an Amazon warehouse, prepared the battery for shipment in Amazon-branded packaging, and sent it to *Bolger*.

As stated by the appellate court:

Amazon placed itself between Lenoge and *Bolger* in the chain of distribution of the product at issue here. Amazon accepted possession of the product from Lenoge, stored it in an Amazon warehouse, attracted *Bolger* to the Amazon website, provided her with a product listing for Lenoge’s product, received her payment for the product, and shipped the product in Amazon packaging to her. Amazon set the terms of its relationship with Lenoge, controlled the conditions of Lenoge’s offer for sale on Amazon, limited Lenoge’s access to Amazon’s customer information, forced Lenoge to communicate with customers through Amazon and demanded indemnification as well as substantial fees on each purchase. Whatever term we use to describe



Amazon's role, be it "retailer," "distributor," or merely "facilitator," it was pivotal in bringing the product here to the consumer.<sup>8</sup>

The appellate court recognized that, in some circumstances, "Amazon is the only member of the enterprise reasonably available to an injured consumer."<sup>9</sup> The appellate court's ruling, however, was limited to those third-party sellers that participate in Amazon's "Fulfilled by Amazon" (FBA) program. That program allows sellers to register as an FBA. In Amazon's FBA program, the customer returns a product to Amazon, not the third-party seller. FBA sellers are required to use only the tools and methods designated by Amazon to communicate with their customers. FBA sellers pay Amazon storage and fulfillment fees. Amazon stores, packages, sells, and ships the product to the end-consumer.

The appellate court also addressed Amazon's Business Solution Agreement. (BSA). Amazon's BSA governs all third-party sellers, regardless of FBA status. The BSA requires a third-party seller to indemnify Amazon for any claim related to its products sold through Amazon. If its sales are above a certain threshold, the third party is required to obtain general commercial liability insurance; listing Amazon as a named insured.<sup>10</sup>

In support of Amazon's position, the U.S. Chamber of Commerce filed an amicus brief supporting the position that Amazon should not be subject to California strict tort product liability law. In its brief, the Chamber argued that applying strict liability law to Amazon would harm small businesses and entrepreneurs that rely on Amazon to sell products to consumers.<sup>11</sup> The Chamber claimed that subjecting Amazon to strict liability would result in higher costs to consumers or make Amazon's marketplace cost-prohibitive for many sellers.

In its ruling, the California Court of Appeal rejected the Chamber's arguments. It recognized that Amazon can exert its influence on third-party sellers to enhance product safety and is an integral part of the overall producing and marketing enterprise and should bear the cost of injuries resulting from defective products.<sup>12</sup> Further, it recognized that Amazon is not unlike other conventional retailers, which can adjust the price of compensating injured plaintiffs between itself and third-party sellers.<sup>13</sup>

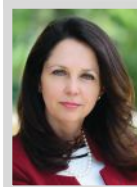
As of the time of this writing, Amazon has not made public its decision whether to seek review by California's Supreme Court. Nonetheless, California's legislative branch has proposed AB 3262 (D-Mark Stone), which was passed unanimously by the Senate's Judiciary Committee on August 18, 2020. That bill deems, with limited exceptions, electronic retail marketplaces, like Amazon.com, to be retailers for purposes of California's strict product liability law.<sup>14</sup> Amazon has signaled its intent to support the law, as long as it applies equally to all stores.<sup>15</sup> In its statement, Amazon wrote, "injured consumers should be able to seek compensation regardless of how a particular online marketplace makes money" and it agrees "it is time for legislation that makes it clear that customers can seek remedies from any store where they buy products," including online marketplaces.<sup>16</sup>

As practitioners, we need to be mindful of consumers who are injured by defective products purchased online. Like California, Florida consumers should be able to hold Amazon accountable for placing into the stream of commerce defective or dangerous products — just like they can with Florida's brick-and-mortar businesses. Certainly, *Bolger* and AB3262 are steps in the right direction. ■



#### ADAM J. LANGINO

is of counsel in Cohen Milstein's Complex Tort Litigation practice and focuses on catastrophic injury, managed care abuse, and product safety litigation. He works in the firm's Palm Beach Gardens and Raleigh offices. Langino began his career as an assistant public defender in West Palm Beach and clerked for the Federal Public Defender in Minneapolis. Langino serves as a chair for the American Association for Justice's Product Liability Section. He's recognized by The National Trial Lawyers as one of Florida's "Top 40 Under 40" and a "Top 100 Trial Lawyer," Florida Super Lawyers "Rising Star," and Florida Trend's "Up & Comer." He is Martindale-Hubbell AV rated.



#### LESLIE MITCHELL KROEGER

is a partner at Cohen Milstein and co-chair of the firm's Complex Tort Litigation practice group. Kroeger began her career as an assistant public defender and later became an assistant state attorney in Miami-Dade County. She now focuses on complex, high-profile product liability, wrongful death, and managed care abuse litigation in Florida and nationwide. Kroeger will be appointed Florida Justice Association's president-elect in June 2018; she is also the past chair of FJA's Women's Caucus. She served on Florida Bar Association's Professional Ethics Committee, and is past president of the Martin County Chapter of the Florida Association for Women Lawyers. She is AV-rated by Martindale-Hubbell and is consistently recognized by *Best Lawyers*, *Florida Super Lawyers*, and *Florida Trend's* Legal Elite. Kroeger is a recipient of the *Daily Business Review's* 2018 Distinguished Leader award.

<sup>1</sup> *Bolger v. Amazon.com, LLC*, No. D075738, 2020 Cal. App. LEXIS 761 (Ct. App. Aug. 13, 2020)

<sup>2</sup> *Id.* at \*6.

<sup>3</sup> *Id.*

<sup>4</sup> *Bolger v. Herocell, Inc.*, Superior Court of California, County of San Diego, Central Division, Case No. 37-2017-3009-CU-PL-CTL.

<sup>5</sup> *Bolger v. Amazon.com, LLC*, *supra*, at \*15.

<sup>6</sup> *Id.* at \*2.

<sup>7</sup> *Id.* at \*8.

<sup>8</sup> *Id.* at \*3.

<sup>9</sup> *Id.* at \*4.

<sup>10</sup> *Id.* at \*11.

<sup>11</sup> Amicus Curiae Brief of The Chamber of Commerce of the United States of America in Support of Respondent at 17-18.

<sup>12</sup> *Bolger v. Amazon.com, LLC*, *supra*, at \*\*25-27

<sup>13</sup> *Id.* at 28

<sup>14</sup> See [https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill\\_Id.=201920200AB3262](https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_Id.=201920200AB3262)

<sup>15</sup> <https://blog.aboutamazon.com/policy/amazon-stands-ready-to-support-ab-3262-if-all-stores-are-held-to-the-same-standards>

<sup>16</sup> *Id.*